BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CYNTHIA J. WATTS	)	
Claimant	)	
	)	
VS.	)	
	)	
MIDWEST PAINTING	)	
Respondent	)	Docket Nos. 1,022,574 &
	)	1,022,575
	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY INS.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 2, 2007, Award entered by Special Administrative Law Judge Marvin Appling. Respondent filed a brief with the Board. Claimant did not. But both parties presented oral argument to the Board on November 13, 2007. Andrew E. Busch, of Bentonville, Arkansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) awarded claimant a 5 percent permanent partial disability to the body as a whole for her back. This permanent partial disability award was based upon the functional impairment ratings of Dr. John McMaster and Dr. Paul Stein.[1] The SALJ found claimant suffered no permanent impairment of function to her hands and wrists and further found that claimant failed to give respondent timely notice of an injury to her hands or wrists. Finally, the SALJ found that claimant retired from her job for reasons other than her workers compensation injuries.

[1] However, in setting out the award, the SALJ stated that claimant was entitled to a 5 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award. However, stipulation number one is partially incorrect. Respondent stipulated that claimant met with personal injury by accident on September 28, 2004, as to her low back. Respondent denied that claimant suffered work-related injuries to her upper extremities. In addition, respondent stipulated that claimant gave respondent timely notice of her accidental injury to her back.

ISSUES

Claimant contends the SALJ failed to review the entirety of the record, specifically the testimony of Dr. Terry Morris. Claimant further contends that the SALJ failed to adequately address the nature and extent of claimant's disability or impairment as to her injuries to her back, wrists, and the aggravation of her fibromyalgia, as well as their relationship to claimant's employment. Last, claimant asserts the SALJ erred in finding that she failed to give notice of her wrist injuries to respondent. Claimant contends she is entitled to a work disability in excess of her total percentage of functional impairments.

Respondent argues that claimant has failed to prove any permanent impairment of function and, therefore, she should be denied any award of permanent partial disability compensation. In the alternative, respondent requests that the Award of the SALJ be affirmed, with the exception that the award should be clarified to show claimant is awarded a 5 percent functional impairment as opposed to a 5 percent work disability.

The issues for the Board's review are:

(1) Did claimant give respondent timely notice of her alleged injuries to her hands and wrists?

(2) Did claimant suffer accidental injuries to her hands and wrists and/or an aggravation of her preexisting fibromyalgia condition that arose out of and in the course of her employment with respondent, in addition to her back, as a direct result of her September 28, 2004, accident?

(3) If so, did she sustain any permanent impairment of function and/or work disability?

FINDINGS OF FACT

At the time of the alleged accidents, claimant was 51 years old. She began working for respondent in 1999 as the office manager. She admittedly suffered from various preexisting conditions, including diabetes, neuropathy, hypertension, fibromyalgia, chronic obstructive pulmonary disease (COPD), severe allergies, and depression. She was involved in a 1998 car accident that injured her right hip. After that accident, she suffered chronic hip and back pain. On September 15, 2004, about two weeks before her injury of

September 28, 2004, she fell down some steps at home and injured her right hip. She missed some work and had difficulty walking for a couple of days after that fall.

On September 28, 2004, claimant was assisting a coworker unload two paint pumps from a truck. While doing so, she felt immediate pain in her back that went down both legs and down her right arm. She called Richard O'Flynn, owner of respondent, and told him she was going to see the doctor, but she did not say she had hurt her back at work. She went to see her personal physician, Dr. Terry Morris.

The next day, claimant told Mr. O'Flynn about the accident and filled out an accident report. She was sent to Via Christi Occupational Health Clinic (Occupational Health) for treatment, where she was given medication, referred to physical therapy, and given temporary work restrictions. She thinks she missed a couple of days of work. She admits that when she returned to work, respondent tried to accommodate her restrictions and even put an air mattress on a table so she could lie down.

During her course of physical therapy, claimant took a week's vacation to Branson, Missouri, because of her stress. A short time after returning from this vacation, on October 20, 2004, she voluntarily resigned her position at respondent because she could no longer do the job she was hired to do. She told Mr. O'Flynn she was leaving for health reasons, which included her injuries plus her diabetes, COPD, and other problems.

Claimant was released from treatment with no restrictions from Occupational Health in November 2004. She has not looked for employment since she left work at respondent. She applied for and received Social Security disability.

Claimant is also claiming she developed bilateral carpal tunnel syndrome as a result of her work activities at respondent. She admits that she did not report an injury to her hands or wrists to Mr. O'Flynn, but she wore a brace on her right hand and thought it was obvious that she had a problem. She testified she was told by Dr. John Forge in 2003 that it was a possibility that she had carpal tunnel syndrome. However, there is no mention of her complaints about pain in her hands or wrists in her medical records until January 2005, when she was in the hospital because of uncontrolled diabetes. She did not seek medical treatment for her hands and wrists until the spring of 2005, when she complained to Dr. Morris about pain in her right wrist.

Claimant related the onset of her bilateral carpal tunnel syndrome to the amount of time she spent on the computer at work. She claimed that she spent four or five hours a day on the computer. She admits she played computer games over her lunch hours and before and after work those days when she was required to come in early or stay late and her work was finished. Mr. O'Flynn denied that claimant regularly spent very many hours a day keyboarding. During the summer of 2004, Mr. Flynn became aware that claimant was playing computer games on her computer at work. He checked the history on the

computer and found that she had played one particular game between 3,000 and 4,000 times.

Mr. O'Flynn admitted he saw claimant wearing a wrist brace one time at work. She did not report to him that she was wearing the wrist brace because of an injury she had suffered at work. Mrs. O'Flynn did not recall ever seeing claimant wear a brace on her wrist or hand. Although claimant indicated she filled out an accident report concerning her upper extremity problems within ten days after she quit working for respondent, neither Mr. O'Flynn nor his wife received that report. After claimant resigned her position with respondent on October 20, 2004, she continued to work as an independent contractor for a period of time training her replacement. The last time claimant worked as an independent contractor was in early April 2005. Both Mr. Flynn and his wife testified that during that period of time, claimant never mentioned a problem with her hands and wrists.

Claimant took the deposition of five people concerning whether she was seen wearing a hand or wrist brace while working for respondent. Phil Busby, Erica Ender and Linda Allen testified they had seen claimant wearing a wrist brace. Neither Pete Chavez or Joan Chance recalled seeing claimant wear a brace.

Mr. O'Flynn made it clear to claimant that she was needed at the office and that he would accommodate any restrictions she had. When claimant informed Mr. O'Flynn and his wife that she intended to resign her position, she said it was not related to her workers compensation claim but that it had to do with her chronic personal health issues. Mr. O'Flynn said that had claimant not resigned, there was work available to her, and her salary and benefits would have remained the same.

Dr. Terry Morris, a general practitioner osteopathic physician, first saw claimant on July 23, 2004. At that time, claimant was complaining of muscle spasms in her back, and he found that she had tenderness and guarding in her back. She had previously been diagnosed with fibromyalgia and diabetes, and he diagnosed her with COPD. Claimant returned on August 20, 2004, again complaining of low back pain. When he saw claimant on September 28, 2004, she was complaining of severe back pain that radiated down her right leg. She reported that she had lifted two paint pumps at work. Dr. Morris found she had tenderness, guarding, and reduced range of motion in her back. She also had tenderness and restricted range of motion in her cervical spine. She was having spasms in both her upper and lower back, and she had swelling in her legs. Dr. Morris diagnosed her with lumbar strain.

Dr. Morris continued to treat claimant for her various medical conditions, including complaints of back pain that radiated down both her legs. On March 11, 2005, she began to complain of pain in her right wrist, and he referred her for testing. On March 28, 2005, he referred her to Dr. George Lucas for treatment of carpal tunnel syndrome. Claimant continued to seek treatment with Dr. Morris, and his records indicate she continued to

complain of headaches, back pain, hip pain, wrist and hand pain, as well as right elbow and shoulder pain. Dr. Morris last saw claimant on January 9, 2006.

Dr. Morris opined that claimant's lumbar strain and bilateral carpal tunnel syndrome were related to her work at respondent. He also believed that claimant's fibromyalgia was aggravated by certain repetitive work activities and lifting that she performed at work.

Dr. Morris restricted claimant's lifting and strenuous activity and restricted her from repetitive work. He reviewed the task list prepared by Jon Rosell, Ph.D., and stated that of the 12 nonduplicated tasks on that list, claimant was unable to perform 11, for a 92 percent task loss. He also reviewed the task list prepared by Karen Terrill, and of the 16 nonduplicated tasks on that list, Dr. Morris opined that claimant was unable to perform 11 for a task loss of 69 percent. Dr. Morris did not rate claimant's functional impairment.

Dr. George Lucas, a board certified orthopedic surgeon with a subspecialty of hand surgery, first saw claimant on May 23, 2005. When giving her history, claimant said she had a two-year history of pain in her hands, worse on the right than on the left. She had pain in the wrist, palm and thenar eminence. She had numbness and tingling in all her digits and she was dropping things. Claimant did not report to him that she had injured her hands or wrists in the course of her employment at respondent. His physical examination of her indicated decreased sensation to all her fingers on both hands, worse on the right than left.

Dr. Lucas performed surgery on claimant's right wrist on June 14, 2005, and on her left wrist on August 11, 2005. He did not specifically believe that there was a correlation between claimant's diabetes and her carpal tunnel syndrome, except that some people with diabetes have some compromise in their peripheral nervous system, so part of her findings may have been a result of her diabetes. On followup, ten days after the surgery on the right, claimant reported the numbness was better. After the second surgery, claimant reported she was doing well. She noted some numbness in the ulnar two fingers. She had a positive ulnar groove Tinel sign on the right but not the left and nothing at the wrist, so he believed she was making reasonable progress. He released her from treatment on January 23, 2006. As of his last office visit, claimant reported she had no numbness. She had some catching of her little and ring finger. She had no objective sensory deficit and no tenderness in the palm and negative Tinel sign. He did not impose any permanent work restrictions on her. He was not asked to provide a permanent impairment rating. But he did not believe she would have a permanent impairment because she had no complaints and no abnormal findings.

Dr. Daniel Zimmerman, who is board certified in internal medicine, examined claimant on March 6, 2006, at the request of claimant's attorney. He reviewed claimant's medical records and took a history from her. Claimant's chief complaint was pain and discomfort affecting the hands, wrists, and digits and an injury affecting the lumbosacral spine. Dr. Zimmerman diagnosed her with bilateral carpal tunnel syndrome, which he

believed was caused by repetitive trauma associated with her activities as an office manager. She reported that the pain and discomfort in her lumbosacral spine was caused when she attempted to lift a large paint tank on September 28, 2004. Dr. Zimmerman diagnosed claimant with permanent aggravation of lumbar disc disease caused by a work related accident on September 28, 2004.

Using the AMA *Guides*,[2] Dr. Zimmerman stated that with reference to residuals of the surgically-treated right carpal tunnel syndrome causally related to her work at respondent, claimant had sustained a 19 percent permanent partial impairment of the right upper extremity at the wrist level, which converted to a whole person rating of 11 percent. Due to permanent residuals of the surgically-treated left carpal tunnel syndrome related to her employment at respondent, claimant had a permanent partial impairment of the left upper extremity at the wrist level of 16 percent, which converted to a whole person rating of 10 percent. Due to permanent aggravation of lumbar disc disease related to the work injury sustained on September 28, 2004, claimant sustained permanent partial impairment of the body as a whole of 15 percent.

Dr. Zimmerman gave claimant a lifting restriction of 20 pounds on an occasional basis and 10 pounds on a frequent basis. He said she should avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding and reaching activities using the upper extremities. She should also avoid frequent flexing of the lumbosacral spine and avoid frequent bending, stooping, squatting, crawling, kneeling and twisting.

Dr. Zimmerman reviewed the task list prepared by Dr. Rosell and of the 12 nonduplicated tasks on that list, opined that claimant is unable to perform 12, for a 100 percent task loss.

Dr. Paul Stein, a board certified neurosurgeon, evaluated claimant at the request of respondent on September 12, 2006. After taking a history from claimant, reviewing the medical records, and conducting a physical examination, Dr. Stein found she had two areas of injury, mid and lower back and bilateral wrist and hand symptomatology. He believed that claimant's injury of September 28, 2004, affected her soft tissues and possibly aggravated a preexisting element of her fibromyalgia. He also believed that claimant had a preexisting condition involving her back, but he could not find anything in the records that would allow him to put her in a diagnosis related estimate (DRE) impairment category for that preexisting condition.

Dr. Stein opined that claimant had a soft tissue injury to her mid to low back. He thinks she probably aggravated her fibromyalgia condition. Based on the AMA *Guides*, he

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

rated claimant as having a DRE Category II 5 percent impairment to the body as a whole. The only really objective findings she had were muscle atrophy and reflex deficiencies.

Dr. Stein did not have any physical or structural basis upon which to recommend any work restrictions. However, considering her fibromyalgia, he would encourage claimant to be as active as possible and not restrict her activities.

Dr. Stein also conducted a physical examination of claimant's hands and wrists. He believed her symptoms were a combination of some element of carpal tunnel syndrome, arthralgia (joint pain from fibromyalgia), and some element of symptom magnification. Dr. Stein did not believe that claimant's medical condition involving her hands, wrists or upper extremities was related to her work activity at respondent. He based this opinion on the timing of when the symptoms were reported, the lack of symptoms while claimant was working, and the fact that she has a variety of other predispositions for this type of symptom, including diabetes and fibromyalgia. Notwithstanding his opinion on causation, Dr. Stein believed that considering her diabetes, fibromyalgia, arthralgias, and wrist pain, it would be common sense for her to avoid intensively repetitive and continuous activities with her hands. Dr. Stein did not formulate an opinion concerning any permanent impairment claimant may have regarding her hands or wrists because he did not believe her hand and wrist conditions were work related. If he were to give an impairment rating to her upper extremity condition, he would give her a 10 percent impairment for mild carpal tunnel syndrome in each hand.

Dr. Steven Hendler, who is board certified in physical medicine and rehabilitation, saw claimant on September 15, 2006, at the request of respondent. He took a history from claimant, performed a physical examination, and reviewed her medical records. Claimant told him that after lifting the paint pumps on September 28, 2004, she had pain in the back extending into her legs and right arm. She saw her personal physician that day and was diagnosed with a muscle problem and was prescribed pain medication and anti-inflammatory agents. The next day she was seen by the workers compensation doctor, x-rays were obtained, she was placed on light duty, and a muscle relaxer was prescribed. She was referred to physical therapy. She has had no treatment for her back condition since completing physical therapy, other than medication. She had permanent work restrictions.

During that same time, claimant developed numbness and tingling in the fingers and was diagnosed with carpal tunnel syndrome. She underwent surgery to both hands. She complained of persistent numbness and tingling in the hands. Dr. Hendler found no documentation of problems with the wrists before or contemporaneous to the last day claimant worked in October 2004.

Dr. Hendler diagnosed claimant with fibromyalgia, lumbar pain, osteoarthritis, diabetes mellitus, and median neuropathies. He opined that she sustained a lumbar or thoracolumbar strain on September 28, 2004. He did not believe that claimant's

complaints concerning her wrists or hands were work-related because no symptoms were reported until three months after she stopped working. He said that diabetes is a risk factor for developing carpal tunnel syndrome and that claimant's history of diabetes was a much greater predisposing factor to having median neuropathies.

In Dr. Hendler's opinion, claimant had no permanent partial impairment. Her medical documentation indicates she returned to her baseline by November 3, 2004, which would be consistent with the kind of injury she had. Generally, the vast majority of people improve from lumbar or thoracolumbar strain within 6 to 12 weeks from the time of onset. He also could not identify any restrictions necessary as a result of claimant's work-related injury.

Dr. Hendler also opined that claimant had no permanent partial impairment resulting from the work activity with respect to the median neuropathies. He reviewed a task list prepared by Dr. Rosell and opined that claimant has not lost the ability to perform any of the tasks identified as a result of any work related injury she may have suffered at respondent.

Dr. Hendler stated that claimant's medical records support that she had carpal tunnel syndrome. However, there was no history given to him of complaints of carpal tunnel syndrome prior to her last day of work. He did not know she had worn splints at work, that she had complained of her hands, and had asked for time off work as a result of her hands. Assuming that to be true, Dr. Hendler still said all he knew was that she had some kind of complaints about the hands. There was no doctor's report of symptoms. He did not see anything on examination that would suggest that claimant had permanent impairment caused by her carpal tunnel syndrome. Furthermore, he could not identify any specific impairment as a result of her fibromyalgia. The symptoms of fibromyalgia could be aggravated by the kind of work claimant was doing.

Dr. John McMaster, who is board certified in emergency medicine and family practice, evaluated claimant on May 16, 2007, at the request of respondent. Dr. McMaster took claimant's history and reviewed her medical records. He conducted a physical examination regarding claimant's claimed back problems and her hand and wrist problems. Claimant told him she was of the opinion that her back had stabilized. She told him she suffers from transient intermittent low back pain, depending upon activities she is involved in. Her back condition waxes and wanes irrespective of her employment tasks or activities of daily living. Dr. McMaster diagnosed claimant with a transient musculoskeletal mechanical low back strain as a result of her injury on September 28, 2004.

Dr. McMaster stated that carpal tunnel syndrome is a condition that is multifactorial in origin. Claimant possessed multiple medical conditions that predispose her, irrespective of employment duties, to developing this condition. Dr. McMaster further stated that nowhere in the records was he able to identify a specific exposure or toxin at respondent that would have precipitated, aggravated or caused this condition to occur. Further, he

was unable to identify through a review of her job tasks any specific factor or task that was performed to such a degree so as to aggravate or exacerbate the condition. In the absence of any specific causal relationship between claimant's job tasks and her bilateral carpal tunnel syndrome, he found that no occupationally related permanent partial impairment rating was justified.

Using the AMA *Guides*, Dr. McMaster found claimant's back condition corresponded to a DRE Category II, lumbosacral spine impairment. He rated claimant as having a 5 percent permanent partial impairment to the body as a whole as a result of her lumbar injury without radiculopathy or loss of motion segment.

Dr. McMaster opined that claimant required no permanent work restrictions in order to prevent further injury or impairment as it relates to the September 28, 2004, occurrence. He stated that the medical reports from Occupational Health indicated claimant had a good recovery from her back injury, and claimant possessed multiple health conditions that predispose her to a waxing and waning of low back pain.

Dr. McMaster stated that medical literature supports that aerobic activity and exercise is beneficial in the treatment of fibromyalgia, so he is not in agreement with Dr. Morris that claimant's work activities aggravated her fibromyalgia.

Dr. McMaster reviewed the task loss opinions of Dr. Rosell and Ms. Terrill. His medical opinion was that claimant did not sustain any loss of capacity or ability to perform the tasks identified in either those documents. He believes that, as far as any work-related injuries claimant suffered at respondent, she is capable of engaging in substantial and gainful employment.

Jon Rosell, Ph.D., a disability consultant/vocational expert, met with claimant on May 4, 2006, at the request of her attorney. Together they prepared a list of 12 nonduplicated tasks she performed in the 15-year period before her injuries.

Dr. Rosell opined that considering claimant's age, education and work experience, there were a limited number of jobs that claimant would be able to perform. The range of jobs available to her is reduced based upon the permanent restrictions established by Dr. Zimmerman. However, he believed claimant would be able to perform work activities such as a surveillance monitor and usher and would be able to earn a salary in the area of $6.50 to $7.50 per hour, which would compute to a 45 to 52 percent wage loss.

Karen Terrill, a rehabilitation consultant, met with claimant on October 2, 2006, and prepared a list of 16 nonduplicated tasks the claimant performed during the 15-year period before her work injury of September 28, 2004. Ms. Terrill sent the task list prepared for respondent and received its description of claimant's work tasks.

Using opinions given by Dr. Stein and Dr. Hendler, Ms. Terrill found that claimant had no loss of wage earning capacity, since neither gave claimant any task loss. In view of the restrictions given claimant by Dr. Zimmerman, Ms. Terrill opined that claimant could become employed in positions such as a bookkeeper/accounting/auditing clerk, which pay a median hourly rate of $13.19. General office clerks earn a median of $10.34 per hour. Receptionist/information clerks earn a median of $9.95 per hour. These factor into an average weekly wage of $398 to $527.60 for a 40-hour week, not including fringe benefits. At the time of the accident, claimant was earning $12.25 per hour or $490 per week. Comparing this to $398 to $527.60, claimant's loss of wage earning capacity would be from 0 to 19 percent.

Claimant told Ms. Terrill that she had not attempted to find employment and that she was 100 percent disabled. She also indicated that at that time she was teaching a floral arranging class and faux painting class at Wichita State University, where she earned $200 a class.

ISSUE NO. 1: Did claimant give respondent timely notice of her alleged injuries to her hands and wrists?

PRINCIPLES OF LAW

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

ANALYSIS

Respondent acknowledges that it received timely notice of claimant's accident and injury to her back but denies receiving notice within 10 days of an accident and injury to claimant's upper extremities. K.S.A. 44-520 requires an injured worker to give notice to her

employer of any work-related accident. The statute does not require that the employee give the employer notice of injury or of each and every body part that may have been injured or affected by an accident. Accordingly, the admitted notice that claimant gave to respondent of her September 28, 2004, accident that occurred when claimant was lifting the paint pumps satisfies the notice requirement for any injuries she suffered in that accident or any aggravations of preexisting conditions that resulted from that accident, as well as any subsequent work-related aggravations or injuries that occurred as a natural consequence of that accident. This would include claimant's back and right upper extremity. This would not include claimant's left upper extremity and would not include any injuries to claimant's back or right upper extremity that were not related to the September 28, 2004, lifting incident.

Respondent contends it first received notice that claimant was alleging injuries to her hands and wrists in April 2005 when it received a letter from claimant's attorney. Claimant admitted at her July 20, 2005, deposition that she never reported repetitive use injuries or having work-related problems with her hands or wrists to any supervisor. She testified differently, however, at the August 8, 2006, regular hearing. There, she said that she gave Mr. O'Flynn a written report of injury to her wrists. But she could not remember whether she delivered it in person or by mail. She did not keep a copy of the alleged document. Respondent denies receiving any such written notice. Due to claimant's conflicting testimony, Mr. O'Flynn's specific denial, and the absence of such a report in the record, the Board finds that claimant did not give respondent either verbal or written notice of repetitive trauma injuries to her upper extremities within 10 days or even 75 days of October 20, 2004, her last working day with respondent.

On September 28, 2004, claimant returned to Dr. Morris following her lifting accident at work. She continued to see Dr. Morris monthly but did not mention upper extremity symptoms to Dr. Morris until March 11, 2005. However, claimant testified that she saw a Dr. Forge in 2003 and was prescribed a wrist splint or splints that she wore to work. Claimant went to Dr. Forge on her own. Respondent did not send her, and his bill was not presented to respondent to be paid as workers compensation. Claimant argues that her use of wrist splints at work constituted notice to respondent of her wrist and hand problems. The Board disagrees**.** Even though Mr. O'Flynn observed claimant wearing splints one time, this would not constitute notice to respondent that any problem claimant was having was work related. Therefore, the Board finds claimant has failed to prove she gave timely notice of repetitive use injuries to her upper extremities and failed to prove she gave timely notice of any other repetitive use or trauma injuries. The Board finds claimant only gave timely notice of her September 28, 2004, accident.

ISSUE NO. 2: Did claimant suffer accidental injuries to her hands and wrists or an aggravation of her preexisting fibromyalgia condition that arose out of and in the course of her employment with respondent, in addition to her back, as a direct result of her September 28, 2004, accident?

PRINCIPLES OF LAW

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

ANALYSIS

Claimant first reported upper extremity symptoms to Dr. Morris on March 11, 2005, approximately five months after she last worked for respondent.[4] At that time she only described right shoulder, right arm and right wrist pain, in addition to her back and lower extremity injuries and other infirmities. Dr. Morris diagnosed claimant with carpal tunnel syndrome and scheduled her for an evaluation with Dr. Lucas. Dr. Morris stated that at that time, claimant also had a knot in her "mid right back" or "flank" area, and he referred her to Dr. Harris for that condition. Although it had not been present before, claimant described the knot as related to her accident at work. The knot turned out to be a lipoma that was removed by Dr. Harris on March 30, 2005. It was not work related. Claimant continued to complain of right wrist and hand pain at subsequent office visits with Dr. Morris, as well as neck, back and leg pain. Dr. Lucas performed surgery on claimant's right wrist on June 14, 2005, and left wrist on August 11, 2005. Dr. Morris continued to treat claimant and saw her more or less monthly. After her surgery, claimant continued to have complaints of right hand pain and limitations, as well as right elbow and shoulder pain. Dr. Morris attributed some of those symptoms to residuals of the surgery and the arm being immobilized. Before his February 14, 2007, deposition, Dr. Morris last saw claimant on January 9, 2006. He related claimant's lumbar strain and arthritic flare conditions to her work, as well as the aggravation of claimant's fibromyalgia and her carpal tunnel syndrome. However, he described the fibromyalgia and carpal tunnel syndrome as caused by

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[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] Claimant reportedly treated with a Dr. Forge in 2003 for her hand and wrist symptoms. Dr. Forge did not testify and, therefore, it is unknown what he diagnosed and whether he related those symptoms to claimant's work.

repetitive work activities, not the lifting accident of September 28, 2004. Dr. Morris said that accident speeded up the progression of the fibromyalgia, but it probably "would have eventually ended up in the same pattern."[5] Furthermore, claimant's preexisting uncontrolled diabetes and COPD may have contributed, and her fibromyalgia certainly did contribute, to her symptoms.

In her Application for Review and during oral argument to the Board, claimant argued the ALJ did not give appropriate weight to the deposition testimony of Dr. Morris. However, the Board finds that Dr. Morris' causation opinions should be given less weight due to the fact that he had no contact with claimant before July 23, 2004, did not have her prior medical treatment records and was unaware of her prior accidents and injuries. In short, he had an incomplete history. He also did not have the benefit of all the subsequent treatment and tests performed on claimant. And he lacked expertise in the conditions he diagnosed. Accordingly, greater weight should be given to the opinions of the specialists to whom claimant was referred, both for examination and treatment.

The Board finds the opinions of Drs. Lucas, Stein and McMaster to be the most credible. Based upon the record as a whole, the Board concludes that claimant suffered a temporary aggravation of her fibromyalgia and a temporary injury to her right upper extremity but did not suffer any permanent injury to her right hand, wrist, arm, shoulder or neck and did not suffer a permanent aggravation of her fibromyalgia as a result of the September 28, 2004, accident.

ISSUE NO. 3: If so, did claimant sustain any permanent impairment of function and/or work disability?

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except

[5] Morris Depo. at 62.

> that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[6] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[7]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.[8] In *Nance*,[9] the Kansas Supreme Court stated:

> When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

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[6] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[8] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[9] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

In *Foulk*,[10] the Kansas Court of Appeals stated:

> Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system.

ANALYSIS

Based upon the opinions of Drs. Stein and McMaster, the Board finds that claimant suffered a 5 percent permanent impairment to her low back as a direct result of the September 28, 2004, accident. Although she has permanent restrictions for that injury, claimant is not entitled to a work disability because she voluntarily quit an accommodated job with respondent that would have paid her 90 percent of her average weekly wage. Therefore, her permanent partial disability compensation is limited to her percentage of functional impairment.

CONCLUSION

(1) Claimant did not give respondent timely notice of her carpal tunnel syndrome injuries to her hands and wrists. Claimant's claim for repetitive trauma injuries is barred by her failure to give timely notice of accident.

(2) Claimant did suffer injuries to her hands and wrists and aggravated her preexisting fibromyalgia condition as the result of repetitive work-related traumas. The September 28, 2004, accident caused a temporary injury to her right arm and a temporary flare up of her fibromyalgia symptoms. Claimant did not suffer any permanent injury to her upper extremities and did not permanently aggravate her fibromyalgia as a result of the accident on September 28, 2004.

(3) Claimant suffered a 5 percent permanent impairment of function to her low back as a result of the accident on September 28, 2004. An award based upon work disability is denied.

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, Syl. ¶ 4, 877 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

The Board notes that notwithstanding the fact that the SALJ awarded claimant's counsel a fee for his services, the record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the SALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated August 2, 2007, should be corrected to show that the 5 percent permanent partial disability award is based upon claimant's percentage of functional impairment and not work disability, but is otherwise affirmed.

Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $360.46 per week or $7,479.54 for a 5 percent functional disability, making a total award of $7,479.54, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge